(1) Supreme Court, U.S.
FILED
JUL 17 2000
OFFICE OF THE CLERK

No. 0 0 100

In The

Supreme Court of the United States

DOUGLAS LEON SMITH
Petitioner

V.

STATE OF ALASKA
Respondent

On Petition For Writ Of Certiorari To
The Alaska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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39pp

I. QUESTIONS PRESENTED

1. The Alaska Appeals Court and Alaska Supreme Court improperly applied the federal inevitable discovery doctrine to excuse violations of Mr. Smith's 5th and 6th Amendment rights to counsel and to remain silent, in a way that conflicts with *Nix v. Williams* 467 U.S. 431 (1984) and Federal Circuit Cases since;

> 1) it was not inevitable that police would have lawfully obtained the evidence before it was removed or destroyed; and
>
> 2) there was no independent or untainted investigation that made the discovery inevitable.

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A. OPINIONS BELOW

Mr. Smith seeks review of *Smith v. State*, 992 P.2d 605(Ak.App.1999) and *Smith v State* (Alaksa Supreme Court 4/21/2000)(final Petition for Review denied).

B. JURISDICTIONAL STATEMENT

Mr. Smith was convicted in the Alaska Superior Court for possession of cocaine in violation of AS 11.71.030. After two appeals to the Alaska Court of Appeals, review was granted by the Alaska Supreme Court in *Smith v. State*, 948 P.2d 473 (Ak.1997) and the case remanded to decide if violations of Mr. Smith's rights were excused under the inevitable discovery doctrine. On remand the court found discovery inevitable. The Appeals Court affirmed in *Smith v. State*, 992 P.2d 605 (Ak. App. 1999) and the Supreme Court denied review on 4/21/2000.

This petition is timely filed within 90 days of the Alaska Supreme Court's final ruling denying review under Supreme Court Rule 13.1 and 13.4 and jurisdiction is pursuant to 28 U.S.C. § 1254(1).

C. TEXT OF AUTHORITIES RELIED UPON

The 5th Amendment states in part: "...No person...shall be deprived of...liberty...without due process of law."

The 6th Amendment states in part: "... the accused shall enjoy the right to...the assistance of counsel..."

I. STATEMENT OF THE CASE

1. ARREST AND DENIAL OF RIGHTS TO COUNSEL & REMAIN SILENT

Mr. Smith was arrested and charged with possession of cocaine with intent to sell in violation of Alaska Statute 11.71.030.[R.1]

During the surveillance Officer O'brien saw Mr. Smith drive up and from his license plate obtained his vehicle registration address over the radio from dispatch. Officer O'brien however did not record or remember the address. [Tr.3,34; Sup. Tr 50-53] After later arresting Mr. Smith Officer O'brien took Mr. Smith to the station for interrogation and seized his driver's license which stated a different and incorrect address. [*Id.* 6,50-53]

Officer O'brien thus interrogated Mr. Smith in order to resolve the two conflicting addresses so she could seek a warrant. At the start of the taped interrogation, Mr. Smith immediately requested a phone call. [R.16-18 Tr. 19-54]

The trial court found Mr. Smith's request for a call was unequivocal and would have been used to call counsel. [Tr. 31,32,54] Officer O'brien refused the request to contact counsel and demanded his address. Mr. Smith asked "do I have to?" Officer O'brien replied "yes" and threatened if he did not disclose his address, he would be jailed without bail. [R.18-35] Mr. Smith stated "I'm in enough trouble as it is..." and then disclosed his address. [R.18-35]

After Mr. Smith disclosed his address he was first given his *Miranda* warnings and again repeated his request to contact counsel or to remain silent on three more occasions but Officer O'brien refused all of his repeated requests and told him he would not get a call until he was booked at the jail and his house was searched. When Officer O'brien threatened to break down the door if he did not produce a key, Mr. Smith complied and produced the key. [R.18-25]

Officer O'brien appeared before a magistrate and obtained a search warrant for Mr. Smith's house based solely on Mr. Smith's statement as to his address. Police searched his house and seized drugs and records in his house that were relied on extensively at trial and which were critical to his conviction for possession with intent to sell cocaine. [R. 26-29, Tr. 325-566]

Nothing in the record establishes that aside from Mr. Smith's illegally obtained address, police would have lawfully resolved the two conflicting addresses and obtained a lawful warrant ***before*** Mr. Smith posted bail and removed the evidence from his house or ***before*** his friends did so.

Nor does evidence established that an independent ongoing investigation - untainted by Officer O'brien's unlawful conduct - would have independently lead to the resolution of Mr. Smith's two conflicting addresses or the eventual discovery of the evidence in his house.

2. EARLIER RULINGS & APPEALS

In the trial court Mr. Smith, moved to suppress evidence from his house, arguing the warrant was unlawful since *inter alia*, Officer O'brien unlawfully obtained his address in violation of 5th and 6th amendment rights to counsel and remain silent, unlawfully coerced his address and violated AS 12.25.150 which requires a call upon request. (Memo 8/13/90 3-4, Tr.36)

The trial court agreed Officer O'brien denied Mr. Smith's right to call counsel under Alaska Statute 12.25.150 but declined to apply the exclusionary rule and did not address alternative constitutional claims though fully briefed in the trial court. (Memo 8/13/90 3-4, Tr.36)

After two appeals to the Alaska Appeals Court the Alaska Supreme Court granted review and in *Smith v. State*, 948 P.2d 473 (Ak.1997) held the exclusionary rule would normally apply but went on to adopt, for the first time, a State "inevitable discovery doctrine" which varied significantly from federal law. The Alaska Supreme Court held state statutory violations could be excused only if the state proved predictable procedures made discovery inevitable and police did not knowingly or intentionally violate rights. The Court remanded for finding under this new Alaska State inevitable discovery doctrine.

The Alaska Supreme Court also limited its ruling to state violations and thus declined to address violations of Mr. Smith's 5th and 6th amendment rights though this was fully briefed by Mr. Smith in briefs to the Alaska Appeals Court (Appeals Court Brief 1,10,17,1824,37] and Alaska Supreme Court. (Petition 10-11 & Open Brief 13-14)

The Alaska Supreme Court emphasized that under state inevitable discovery unlike federal law, a defendant could *not* argue discovery was not inevitable if the evidence might be removed or destroyed before it is lawfully discovered holding;

> We note in passing that Smith has no right to violate the law by causing the destruction of evidence discovered in the search of his home... A number of other courts, in construing the federal constitution, have suggested that discovery inevitability may be refuted by the possibility of destruction or concealment of evidence by or on behalf of a defendant. *United States v. Cabassa*, 62 F.3d 470,473 (2d Cir.1995); *United States v. Roberts*, 852 F.2d 671, 676 (2d Cir.1988); *United States v. Boatwright*, 822 F.2d 862, 865 (9th Cir.1987); *United States v. Owens*, 782 F.2d 146, 153 (10th Cir.1986); *State v. Miller*, 709 P.2d 225(1985). Because these cases concern constitutional violations we are not persuaded that we should apply them in the context of a violation of an Alaska statute. We need not decide in this case whether violation of a federal or state constitutional provision would require a different analysis. *Id* at 948 P.2d 481 n.7

On remand Mr. Smith reasserted federal 5th & 6th amendment claims and argued discovery was not inevitable under federal law since; 1) police would not have lawfully resolved the addresses *before* the evidence

would be removed; and 2) no independent, untainted investigation was in place to find the address. [Brief on Remand @ pages 11-12,14 & Mot reconsider @ pages 8-10] The trial court held inevitable discovery applied under state statutory law and without discussion held the same result would apply to any federal violations. (Order Denying Reconsideration @ 7-8)

The Appeals Court affirmed in *Smith v. State*, 992 P.2d 605(Ak.App. 1999). The Alaska Appeals Court simply ignored Mr. Smith's first claim - that under federal law discovery was not inevitable if the evidence might be removed before discovery. As his second argument, the Alaska Appeals Court incorrectly held inevitable discovery did not require an independent untainted investigation under state or federal law and concluded;

> Smith contends that O'brien violated his Fifth amendment right to remain silent and his Sixth amendment right to counsel when she questioned him, obtaining his address. .... Smith notes that he raised these constitutional issues in the trial court in his initial motion to suppress, before the court of appeals in his appeal from the trial court's decision to deny suppression, and in his petition and brief to the supreme court... In our former decision .... We implicitly rejected the claim that Smith would be entitled to any greater relief if he showed constitutional violations rather than a statutory violation. Smith raised his constitutional claims before the supreme court. In its *Smith* opinion, the supreme

> court recognized only a violation of Smith's rights under AS 12.25.150. (FN28) It appears to us that the supreme court either implicitly rejected Smith's constitutional claims or concluded that even if Smith established a violation of his constitutional rights the same inevitable discovery test would apply. As we have previously stated, it does not appear to us that the federal test for inevitable discovery, as stated by the Ninth Circuit, is more strict than the test applied by the Supreme Court of Alaska.... We therefore conclude that, even if Smith established the state violated constitutional rights the state also established that the information concerning his address was the product of inevitable discovery and that there was no basis for suppressing the results of the search ... *Id.* 609 610

Thus the Alaska Appeals Court; 1) ignored federal law that holds discovery is not inevitable if evidence might be removed before it is lawfully discovered; and 2) incorrectly held an independent and untainted investigation is not required under federal law.

Mr. Smith then sought review with the Supreme Court, again making the above arguments that the 5th and 6th amendment violations were not excusable under differing federal inevitable discovery standards. (Opening Petition @ pages 10-15 and Reply @ page 1)

The Supreme Court denied review on 4/21/2000 in a one sentence order.

II. ARGUMENTS & REASONS FOR GRANTING REVIEW

The Alaska Appeals Court's application of the inevitable discovery doctrine conflicts with Federal Supreme court and Circuit Court law and denies 5th and 6th Amendment rights to counsel and to remain silent.

The arguments that follow will establish that:

1. Mr. Smith's 5th and 6th amendment rights were violated when police refused his request to contact counsel and forced him to disclose his address.

2. The Alaska Courts have disregarded *Nix* and Federal Circuit law since discovery of evidence was not "inevitable" where police would not have lawfully resolved the two addresses BEFORE Mr. Smith posted bail and removed the evidence or had friends do so.

3. The Alaska Courts have disregarded *Nix* and Federal Circuit law by eliminating the requirement of an independent and untainted investigation or at minimum a routine procedure by independent, untainted officers.

4. At minimum, this Court should remand and order the Alaska Courts to at least address 5th and 6th amendment violations and apply the correct federal inevitable discovery doctrine, instead of differing Alaska state standards.

1. MR. SMITH'S 5TH & 6TH AMENDMENT RIGHTS WERE VIOLATED

The refusal to permit Mr. Smith's call to counsel and statement that he must disclose his address denied his rights to counsel and to remain silent in violation of the 5th and 6th amendments. *Miranda v. Arizona* 384 U.S. 436 (1966); *Minnick v. Mississippi* 111 S.Ct. 486 (1990).

In *Miranda* it was established that if an accused asks to call counsel in any manner that police must stop immediately. *Miranda* holds that if a suspect:

> ... indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.

Miranda supra at 444-45

It also violated federal due process to threaten Mr. Smith with jail without bail. This Court in *Miranda, supra* held that threats will render a statement involuntary. Mr. Smith was improperly forced to choose between rights to remain silent and bail. This was inherently coercive.

The Alaska Courts did not dispute that Mr. Smith's 5th and 6th amendment rights were violated. Rather they sidestepped the issue by improperly concluding that the inevitable discovery doctrine excused these federal violations. However the arguments that follow establish that under the federal standards of *Nix, supra* and the federal circuits, inevitable discovery can not apply .

2. DISCOVERY NOT INEVITABLE SINCE EVIDENCE WOULD BE REMOVED BEFORE DISCOVERY

The discovery of the evidence in Mr. Smith's house was not inevitable. If Mr. Smith had called counsel he would not have disclosed his address. Police would not have obtained and reconciled his two conflicting addresses and obtained a warrant BEFORE Mr. Smith posted bail and removed the evidence or called friends to do so. [Supp Tr.27.12/17/93 p.50-53 and R.26-29]

The inevitable discovery doctrine was adopted by this Court in *Nix v Williams* 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). In *Nix, supra*, a team was searching for and systematically proceeding toward a body, which was in plain view in an area where police were specifically ordered to look. The body was frozen and not subject to change. Before police found the body, an independent set of agents unlawfully obtained a statement from Nix as to its location. This Court held it was inevitable the independent team would have discovered the body without the unlawful statement;

> If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means--here the volunteers' search--then the deterrence rationale has so little basis that the evidence should be received.

Id. at 444 n. 4 This Court in *Nix* held "inevitability" requires certainty and not speculation ruling "...inevitable discovery involves no speculative elements but focuses on

demonstrated historical facts capable of ready verification or impeachment. " *Id.* at 444 n. 5

Federal Circuits agree that Nix requires; 1) proof that discovery is inevitable; 2) by means attenuated from illegal conduct; and 3) by an independent investigation in place at the time. *United States v. Cherry*, 759 F.2d 1196 (5th Cir.1985), *cert. denied*, 479 U.S. 1056(1987).

Inevitability requires a probability of what "would" occur. As Professor LaFave warns that "...the significance of the word "would" cannot be overemphasized. It is not enough to show that the evidence "might" or "could" have been otherwise obtained. *LaFave, Search and Seizure* vol. 4 sec. 11.4(a), p.383 (2d ed. 1987)

Federal circuits have thus held discovery is not "inevitable" if it is possible evidence will be removed or destroyed ***before*** police can independently and lawfully obtain the evidence. This Court in *Nix*, thus emphasized the body would not have been removed before the independent team lawfully discovered it. *Id* at 444

The Federal Circuits uniformly hold that discovery of unlawful evidence is not "inevitable" if evidence might be removed or destroyed before police can pursue an independent and lawful investigation. *United States v. Cabassa*, 62 F.3d 470, 473-74 (2d Cir.1995); *United States v. Roberts*, 852 F.2d 671, (2d Cir.1988); *United States v. Thomas*, 955 F. 2d 207 (4th Cir. 1992): *United States v. Boatwright*, 822 F.2d 862(9th Cir.1987); *Center Art Galleries-Hawaii* v. U.S. 875 F.2d 747 (9th Cir.1989) *United States v. Owens* 782 F.2d 146 (10th Cir.1986).

Thus in *United States v. Owens, supra,* police arrested Owens and unlawfully searched his motel room finding drugs. The government argued the drugs would have been inevitably discovered by motel staff who would have called police anyway. The 10th Circuit held discovery was not inevitable since Owens might have posted bail and removed the drugs before they were found;

> Finally, absent the unlawful search, Owens might have posted bail on the charge of receiving stolen property and could have returned to his motel room before either the cleaning staff or the police discovered the contraband. Alternatively a friend could have returned to claim the closed bag. We conclude that the "inevitable discovery" exception to the exclusionary rule cannot be invoked because of the highly speculative assumption of inevitability that would be required to apply here.

Id. at 153. Accord. *United States v. Thomas, supra.*

In *United States v. Boatwright, supra,* the 9th Circuit held discovery was not inevitable where agents unlawfully searched and found illegal weapons. Though it was inevitable that agents would return with a warrant it was not inevitable that the weapons would not be removed first since "... Rickie would not have waited patiently beside his weapons for an agent to arrive." *Id.* at 865

In *United States v. Roberts, supra* illegally seized

documents were independently under subpoena. The Second Circuit held discovery was not inevitable since they might destroy them before the subpoena was served.

> ... we can deplore but not ignore the possibility that the recipient of a subpoena may falsely claim to have lost or destroyed the documents called for or may even deliberately conceal or destroy them after service of the subpoena. Thus the government cannot show that its subpoena would have inevitably resulted in discovery of the suppressed documents.

Id. at 676. In *Center Art Galleries-Hawaii v. United States* 875 F.2d 747 (9th Cir. 1989) the 9th Circuit agreed that a subpoena did not insure evidence would not be removed or destroyed before discovery. *Id* at 754 /[1]

The Alaska Appeals Court ruled that police would have eventually resolved the addresses and obtained a warrant. *Smith, supra* at 608. The Alaska Appeals Court however did not find this would occur BEFORE the evidence was removed, as required by Federal law. The Appeals Court simply ignored this issue, while the Alaska Supreme Court refused to permit this requirement in direct conflict with federal law. *Smith, supra* at 481 n.7

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1. Other States agree with federal law. *State v. Wilmart* 450 N.W. 2d 703 (Neb. 1990)(discovery not "inevitable" if defendant might dispose of drugs before police obtained a warrant); *Mitchell v. State* 742 P.2d 895 (Ark. 1988.) (Not clear independent investigation would have found the body aside from illegal entry)

Nor does the record show that police would inevitably have discovered the evidence in Mr. Smith's house before it was removed or destroyed. The discovery of Mr. Smith's correct address would have taken some time had police not forced Mr. Smith to disclose it before contacting counsel. The Police would have had to look up two addresses and go to each address. If Mr. Smith's residence was not clear from outside the buildings, police would have had to contact witnesses to verify his residence. Police then would have to appear before a magistrate, obtain a warrant and execute the search.

Nothing in the record indicates how long an investigation of Mr. Smith's address might take. It could have taken days. By then the evidence would have been removed or destroyed by Mr. Smith or his associates. /[2]

It would be pure speculation to assume police would resolve the two conflicting addresses and served the warrant **BEFORE** the evidence was removed or destroyed and it is exactly this kind of speculation that *Nix, supra* forbids. Under federal law, there thus can be no inevitable discovery.

This court should grant review to insure that federal inevitable discovery standards are not ignored and diluted by the Alaska State Courts.

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2. While the address in MR. SMITH's vehicle registration was consistent with the time it took for Mr. Smith to arrive at the parking lot where the drugs were sold, this did not resolve the conflict since nothing in the record indicates that the conflicting address contained in MR. SMITH's driver's license was not an equal distance away.

3. NO INDEPENDENT INVESTIGATION

Discovery of the evidence was also not "inevitable" since there was no "independent investigation" to find Mr. Smith's address as required by *Nix* and Federal Circuits.

Under *Nix*, an independent, untainted investigation is required "... because otherwise the inevitable discovery exception will swallow the exclusionary rule." *United States v. Boatwright, supra; United States v. Thomas, supra.* Thus in *Nix, supra,* the body was about to be discovered by an independent team which was unaware of the illegal conduct. This independent investigation caused the Supreme Court in *Nix* to conclude that "...inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification..." *Nix, supra* 467 at 444 n. 5

Federal Courts have thus all held that *Nix, supra,* requires an independent untainted investigation. /[3]

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3. First Circuit; *United States v. Silvestri*, 787 F.2d 736, 746 (1st Cir. 1986) *cert. denied*, 487 U.S. 1233, (1988) (independent and active pursuit required.) Second Circuit: *United States v. Eng* 971 F. 2d 854 (2d Cir 1992); *United States v. Pimentel* 810 F. 2d at 369 (2d Cir. 1987) (separate investigation actively pursued at time of misconduct required.) Fourth Circuit: *United States v. Thomas, supra* (ongoing alternative investigation required.) Fifth Circuit: United *States v. Cherry, supra.* Sixth Circuit: *United States v. Buchanan*, 904 F.2d 349, 357 (6th Cir.1990)(alternate line of investigation required.) Ninth Circuit: *United States v. Boatwright, supra* (independent ongoing investigation required.) Tenth Circuit: *United States v. Owens*, 782 F.2d 146, 152 (10th Cir.1986) Eleventh Circuit: *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir.1984) *cert. denied*, 471 U.S. 1117 (1985).

The 5th Circuit in *United States v. Cherry supra* held the requirement of an ongoing independent investigation was critical under *Nix* to protect constitutional rights;

> ...where police have not been in active pursuit of an alternative line of investigation that is at minimum supportable by leads the general application of the inevitable discovery exception would greatly encourage the police to engage in illegal conduct ... While suppression in such a case may put the prosecution in a worse position because of police misconduct, a contrary result would cause the inevitable discovery exception to swallow the rule by allowing evidence otherwise tainted to be admitted merely because the police could have chosen to act differently and obtain the evidence by legal means.

Id at 1204, 1205

The Alaska Appeals Court in *Smith, supra,* at 609 notes that the 9th Circuit has held that requirement of an ongoing investigation is satisfied by a "routine procedure" such as a routine police booking or routine police inventory and concluded it would have been "routine" for Officer O'brien to eventually find and search Mr. Smith's house. While this might be a logical coarse for Officer O'brien to take, this still differs from a routine booking. A booking or inventory is a procedure which *is in place,* does not vary from case to case, does not involve

discretion and is automatically conducted by independent and untainted officers who did not break the law.

Thus in *U.S. v. Andrade*, 784 F.2d 1431,1433 (9th Cir.1986) the 9th Circuit held a routine booking inventory sufficed, but the routine booking was in place and conducted by untainted police who did not break the law. By contrast in *U.S. v. Ramirez-Sandoval* 872 F.2d 1392 (9th Cir.1989) the 9th Circuit refused to find a procedure sufficiently routine. *See also*; *United States v. Gorski* 852 F. 2d 692, (2d Cir.1988)(discovery of drugs not inevitable since nothing showed it was routine to inventory all bags); *United States v. Ornelas-Ledesma* 16 F. 3rd 714 (7th Cir. 1994) (Discovery by dog not inevitable since nothing shows accuracy of dog.) *United States v. Infante-Ruiz* 13 F. 3rd 499 at 504 (2d Cir 1993)(procedure not routine)

Under the above law there was no independent investigation that insured Mr. Smith's house would be searched. No untainted officer was trying to resolve the conflicting addresses. It was a discretionary call to search Mr. Smith's house and unlike a booking procedure this was not an automatic act conducted by untainted police.

The Alaska Appeals Court ruling is 100% contrary to the reasoning of *Nix* and the holdings of all Circuit Courts. As noted above, *Nix* and its progeny were careful to rule that the inevitable discovery doctrine would not dilute the deterrent effect of the exclusionary rule since if discovery were truly independent and untainted then there would be no reward for breaking the law.

In Mr. Smith's case however police are rewarded and encouraged to break the law, if all that is required is

for Officer O'brien to testify ...." Gee, trust me, I could have gotten a legal warrant anyway." If the Alaska Appeals Court ruling is permitted to stand then Alaska police can routinely take short cuts and violate federal rights, safe in assuming that the Alaska Court's will excuse their intentional misconduct so long as a lawful alternative is hypothetically available.

In fact under the Alaska Appeals Court decision, the police have nothing to lose and everything to gain by breaking the law. Why should police bother to actually get a valid warrant, if all they must do is to simply claim they could have obtained one had they bothered to do so? Police might as well take the short cut and not bother to follow the law, under the safe assumption that the Alaska Courts will bail them out with its distorted application of the inevitable discovery doctrine.

Indeed the Alaska Courts' distortion of the inevitable discovery doctrine is exactly what the 5th Circuit warned against in *United States v. Cherry* when it wrote "... a contrary result would cause the inevitable discovery exception to swallow the rule by allowing evidence otherwise tainted to be admitted merely because the police could have chosen to act differently and obtain the evidence by legal means." *Id* at 1204 - 1205

This court should grant review to insure that the ruling of this Court in *Nix* and the Circuit courts are not ignored and diluted by the Alaska Courts.

4. ALASKA COURTS SHOULD AT LEAST BE REQUIRED TO APPLY FEDERAL INEVITABLE DISCOVERY STANDARDS TO FEDERAL VIOLATIONS

Counsel realizes this Court rarely takes petitions on behalf of criminal defendants and this almost never occurs in an Alaska case. Perhaps this is why the Alaska Appeals Court and Alaska Supreme Court do not feel obligated to bother correctly addressing and applying federal inevitable discovery standards.

As cited above the federal violations were raised at every juncture in the Alaska Courts. *Infra* 4-6 After remand on the issue of inevitable discovery, the federal inevitable discovery standards were fully briefed to the trial court, Appeals Court and Alaska Supreme Court. *Id.* Yet the correct federal standards were never applied by the Alaska courts and the most critical argument under federal law was simply ignored by the Appeals Court. Unfortunately, the Alaska Courts can safely ignore federal requirements, knowing that federal relief is a long shot.

Should this court not accept review, at minimum it is urged that this court issue a short remand, with the simple order that the Alaska Courts attempt to apply the correct federal inevitable discovery standards to the alleged federal violations.

No matter what the outcome of such a remand order, at least petitioner will be able to say - for the first time - that his federal rights have been considered and that he has finally had his day in court.

III. CONCLUSION

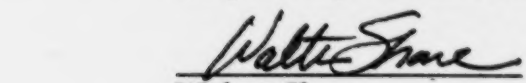
The Alaska Courts have disregarded *Nix* and Federal Circuit law since discovery of evidence was not "inevitable" where police would not have lawfully resolved the two conflicting addresses BEFORE Mr. Smith posted bail and removed evidence or had friends do so.

The Alaska Appeals Court's opinion is 100% at odds with this Court in *Nix, supra* and Federal Circuit Courts since the Alaska Courts have eliminated the requirement of an independent, untainted investigation or at least an independent and untainted routine procedure.

This Court should grant review, to insure the inevitable discovery rule does not swallow the exclusionary rule. The Alaska Court's distortion of the inevitable discovery doctrine encourages police to break the law and rewards them for doing so. Such a result is 100% at odds with this Court's holding in *Nix*.

At minimum, this Court should remand and order the Alaska Courts to at least address 5th and 6th amendment violations and apply federal inevitable discovery law instead of differing State standards.

Respectfully submitted this 12th day of July, 2000.



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Appendix A

IN THE SUPREME COURT FOR THE STATE OF ALASKA

Douglas L. Smith	)	
	)	Supreme Court No
Petitioner	)	S-09493
	)	
v.	)	Order
	)	Petition for Hearing
State of Alaska	)	
Respondent	)	Date of Order: 4/21/00

Trial Court Case # 3AN-90-01097 CR
Court of Appeals # A-04054

Before: Matthews, Chief Justice, Eastaugh, Fabe, Bryner,Carpeneti, Justices.

On Consideration of the Petition for Hearing filed on 2/7/00 and the response filed on 3/13/00.

IT IS ORDERED:

The Petition for Hearing is DENIED.

Entered by the direction of the court.

Clerk of the Appellate Courts

S:/ signed by
Marilyn May

Appendix B

Douglas Leon SMITH, Appellant,
v.
STATE of Alaska, Appellee.

No. A-4054.
Court of Appeals of Alaska.
Dec. 3, 1999.
Rehearing Denied Dec. 23, 1999.

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Before: COATS, Chief Judge, and MANNHEIMER and STEWART, Judges.

OPINION

COATS, Chief Judge.

This case presents the issue of whether the trial court properly applied the inevitable discovery exception to the exclusionary rule adopted by the Alaska Supreme Court in Smith v. State. (FN1) We affirm the trial court's decision.

Douglas Leon Smith was convicted, following a jury trial, of misconduct involving a controlled substance in the third degree, a class B felony. (FN2) Smith now appeals, arguing that evidence obtained from his home should be suppressed because Superior Court Judge Eric

T. Sanders incorrectly applied Alaska's inevitable discovery exception.

1. Drug Transaction and Arrest: In February of 1990, Wilbur Hooks, an investigator with the Anchorage Police Department, arranged to sell a kilogram of cocaine to Edwardo Aragon in the parking lot of the Carrs store on the corner of Muldoon Road and Northern Lights Blvd. (During the transaction, Hooks wore a wire so that his conversations could be monitored by Officer Linda O'Brien, the case officer.) After meeting in the parking lot, Aragon asked Hooks to accompany him to the house of his "money man" to complete the transaction. Hooks refused to leave the parking lot so Aragon called his "money man" to arrange to have him join them. Aragon told Hooks that his "money man" was white and would be driving a brown pickup truck. The "money man," appellant Smith, arrived approximately ten minutes later in a brown pickup truck. When Smith arrived in the parking lot, Officer O'Brien called the Anchorage Police Department to obtain a registration check on the pickup truck. From this check, O'Brien learned that the vehicle was registered to a Douglas Leon Smith who lived at 7929 East Third Avenue. Hooks received $26,000 from Smith, thus completing the transaction. Following a high-speed chase, police arrested Smith. In Smith's vehicle, police found utility bills that also showed that Smith lived at 7929 East Third Avenue. However, the address that the police obtained from Smith's driver's license differed from the address found on Smith's vehicle registration and utility bills.

2. O'Brien's Interview of Smith: Officer O'Brien met Smith in an interrogation room at the police station

and questioned him to obtain basic booking information. She began by asking his name, height, weight, social security number, and driver's license number. In doing so, she followed a standardized booking form. Smith requested a phone call. O'Brien told Smith that he could make a phone call once he arrived at the jail. She then asked Smith for his address. He asked if he was required to answer. O'Brien replied that she would ask the Magistrate to require Smith to provide his address as a condition of bail. Smith then gave his address. O'Brien completed the booking form, then read Smith his Miranda rights. (FN3)

3. Search Warrant: O'Brien obtained a search warrant for the residence at 7929 East Third Avenue. During the warrant hearing, O'Brien told the magistrate that she knew Smith's address because he had given it to her and because it was listed on his driver's license. The police searched Smith's residence on East Third Avenue and discovered records of drug sales, guns, marijuana, cocaine, drug paraphernalia, and $100,000 in cash.

*607 4. Trial and Initial Motion to Suppress: At trial, the state sought to have these materials admitted into evidence. Smith moved to suppress on the grounds that Officer O'Brien had denied him his statutory right to make a phone call and violated his constitutional rights when she questioned him, obtaining his address. He argued that the search warrant and all the evidence which police discovered in serving the search warrant should be suppressed as a result of these violations. At the suppression hearing, O'Brien testified that she relied on other sources of information to obtain Smith's address. She explained that she initially learned that Smith lived at

7929 East Third Avenue by running a check on his vehicle registration. She also testified that this was corroborated by Aragon's general description of where Smith lived. Superior Court Judge Karl Johnstone found that Officer O'Brien had violated Smith's right, under AS 12.25.150, to make a phone call. (FN4) However, the judge denied Smith's motion to suppress because he found that Officer O'Brien had obtained Smith's address from his vehicle registration before she questioned him. The court found that O'Brien had questioned Smith to obtain booking information rather than to gain information to be used in a search warrant. He concluded that the fact that O'Brien had violated Smith's rights by denying him his right to make a telephone call did not cause Smith to tell O'Brien his address when she questioned him. Smith was convicted and appealed, arguing, among other things, that Judge Johnstone erred in not granting his motion to suppress because when Officer O'Brien questioned him, his rights under AS 12.25.150 and the state and federal constitutions had been violated.

5. Independent Source Litigation: On appeal, we concluded that Judge Johnstone did not err in finding that Smith's rights, under AS 12.25.150 and Zsupnik, had been violated. We concluded that the court erred in not suppressing Smith's statement to Officer O'Brien revealing his address as a fruit of this violation. But since it appeared that the warrant itself might not have been a fruit of the violation because the police arguably were aware of Smith's address before they illegally obtained it, we remanded the case for application of the independent source exception to the exclusionary rule. (FN5) On remand, Judge Johnstone heard evidence regarding the applicability of the independent source doctrine and

found that O'Brien had obtained Smith's address from checking his registration before she questioned him and concluded that the police were aware of Smith's address and would have obtained a warrant to search Smith's residence even without Smith's statement to Officer O'Brien. (FN6) We affirmed Judge Johnstone's decision to deny Smith's motion to suppress.

6. Inevitable Discovery: Smith next filed a petition for hearing in the Alaska Supreme Court in which he argued that we erroneously upheld the trial court's application of the independent source doctrine and also argued that his rights under the state and federal constitutions had been violated. In Smith v. State, (FN7) the supreme court held that the independent source doctrine did not apply to the facts of Smith's case. The court pointed out that although O'Brien had already obtained Smith's address from his registration before she questioned him, she had not written that address down. She had actually used Smith's statement to obtain the warrant, not the registration:

> The independent source exception requires that the police know of and act on lawfully obtained independent evidence at the time they take the challenged action--here the application for a warrant. The fact that the police could have easily obtained lawful evidence is insufficient by itself to meet this requirement. (FN8)

The court, however, accepted the inevitable discovery exception to the exclusionary rule *608 as a matter of state law, held that the exception might apply

in this case, and remanded the case for consideration of this question. (FN9)

The Alaska Supreme Court described the test for the applicability of the inevitable discovery exception in the following manner: "if the prosecution can show, by clear and convincing evidence, that illegally obtained evidence would have been discovered through predictable investigative processes, such evidence need not be suppressed as long as the police have not knowingly or intentionally violated the rights of the accused in obtaining that evidence." (FN10)

The inevitable discovery exception, like the independent source exception, helps to balance the effects of the exclusionary rule. The supreme court noted that the " 'core rationale' for the exclusionary rule is 'to deter police from violations of constitutional and statutory protections.' " (FN11) The exclusionary rule prevents the prosecution from being in a better position than it would have been had a violation not occurred. Correspondingly, the independent source and inevitable discovery exceptions are "not meant to put the prosecution in a position worse than if no police misconduct occurred." (FN12)

The Alaska Supreme Court recognized several potential problems associated with the application of the inevitable discovery exception. First, the supreme court noted that the exception creates the opportunity for conjectural or hypothetical arguments regarding the inevitability of police discovery of a piece of evidence. To combat this problem, the supreme court, following Justice Brennan's suggestion in Nix v. Williams, (FN13) decided

to require the police to show by clear and convincing evidence that the evidence would have been discovered by legal means. (FN14) This heightened evidentiary standard is designed to diminish the risk of admitting illegally obtained evidence. (FN15) Second, the supreme court recognized the need "to safeguard against the use of the inevitable discovery exception in cases where discovery by legal means was possible, but not truly inevitable." (FN16) Under this newly-adopted test for inevitable discovery, the prosecution " 'must establish, first, that certain proper and predictable investigatory procedures would have been utilized in the case at bar, and second, that those procedures would have inevitably resulted in the discovery of the evidence in question.' " (FN17) Finally, the supreme court noted that the existence of the inevitable discovery exception may create an incentive for police illegality. (FN18) Accordingly, the court adopted a good faith requirement that prevents application of the exception when police have intentionally or knowingly violated a suspect's rights. (FN19)

Following the supreme court's decision, the case was remanded to Superior Court Judge Eric Sanders (Judge Johnstone having retired). Following an evidentiary hearing, Judge Sanders concluded that the state established that the inevitable discovery exception to the exclusionary rule applied and declined to suppress the evidence which derived from Smith's statement to the police. In his findings, Judge Sanders found that the circumstances surrounding Smith's arrest, the large sums of money, and the large quantities of drugs, led investigators to believe that they were dealing with a major supplier of drugs. He found that Hooks and

O'Brien, as experienced investigators, would conduct a thorough investigation that would include a search of the defendant's house. Judge Sanders concluded that "[i]t would be a routine step to try to locate Smith's home and *609 search it.... Therefore, the police were following a predictable investigatory procedure when they decided to seek a search warrant soon after Smith was arrested." In addition, Judge Sanders noted that other pieces of evidence--Smith's vehicle registration, receipts and bills found in Smith's vehicle, corroborating comments regarding Smith's address made by Aragon--made discovery of Smith's address inevitable regardless of his statements to Officer O'Brien or the conflicting information on his driver's license.

[1] We are to uphold Judge Sanders' findings of fact unless we find they are clearly erroneous. (FN20) We conclude that his findings are supported by the record and are not clearly erroneous.

[2] Smith argues that federal courts only apply the inevitable discovery doctrine to situations where the government can prove that a totally independent investigation had been previously initiated which would have led to the inevitable discovery of the information in question. But we have previously dealt with the inevitable discovery doctrine in applying federal law in Hazelwood v. State. (FN21) In that case, we relied on decisions from the Ninth Circuit for applying the inevitable discovery rule. We quoted the test from the Ninth Circuit as follows:

> [T]his Circuit does not require that the evidence be obtained from a previously

> initiated, independent investigation. The government can meet its burden by establishing that, by following routine procedures, the police would inevitably have uncovered the evidence. (FN22)

The statement by the Ninth Circuit of the test for determining whether evidence qualifies under the inevtable discovery rule is consistent with the language which the Supreme Court of Alaska used in setting out its statement of the rule. We see no conflict between the test set out by the Alaska Supreme Court and the test set out by tle Ninth Circuit. Although other circuits may have different formulations of the inevitable discovery test, it seems reasonable for us to follow the formulation which the federal court uses in the Ninth Circuit, the circuit which includes the State of Alaska.

From the facts of Smith's case, it seems clear that the Alaska Supreme Court did not intend to adopt an inevtable discovery rule which would require an independent investigation. It was clear that the police did not obtain Smith's address from an independent investigation. The state's claim was that the inevitable discovery rule applied because the police had already obtaned Smith's address before they questioned him. If the supreme court concluded that the state's theory had no merit, it seems unlikely that it would have remanded the case to allow the state the opportunity to develop that theory. We conclude that the state was not required to prove that the information about where Smith resided needed to be obtained from a previously initiated independent investigation. The state was required to show "by clear and convincing evidence, that illegally

obtained evidence would have been discovered through predictable investigative processes." (FN23) This is the test which Judge Sanders applied, and as we have previously stated, his findings are supported by the record and are not clearly erroneous.

[3] Smith argues that Judge Sanders erred in finding that Officer O'Brien did not knowingly or intentionally violate his rights. In rejecting this claim, Judge Sanders found that at the time O'Brien questioned Smith, "the police already possessed much information which revealed Smith's home address and the investigators undoubtedly would have been able to obtain a search warrant for that location." He found that when O'Brien questioned Smith, she was merely questioning him to obtain basic background information such as "his name, height, social security number, driver's license number, home and *610 work address, phone number, whether he was ill and whether he was under the influence of drugs or alcohol." He found that O'Brien "did not seek Smith's address for reasons related to the warrant application." He noted that Judge Johnstone had reached similar conclusions in earlier findings, that O'Brien "was requesting 'simple background information which is routine' when someone is arrested for a felony."

Smith contends that even if we accept these findings, that the record shows that O'Brien knowingly and intentionally violated Smith's rights. He points out that O'Brien certainly intended not to allow Smith to make a telephone call and not to give him Miranda warnings until after she had obtained background information from him. But the Smith opinion makes clear that, when the supreme court referred to a knowing or

intentional violation of rights, the court was referring to the officer's awareness that his actions would violate the defendant's rights. The doctrine of inevitable discovery is available so long as the police did not act in bad faith.

In its Smith opinion, the Alaska Supreme Court accepted Professor LaFave's rationale for a good faith requirement. (FN24) LaFave describes the reasoning behind the good faith requirement in the following manner:

> Because one purpose of the exclusionary rule is to deter [statutory or constitutional violations], there is much to be said for the proposition that the "inevitable discovery" rule should be applied only when it is clear that "the police officers have not acted in bad faith to accelerate the discovery" of the evidence in question. (FN25)

The supreme court also cited favorably to the opinion of the North Dakota Supreme Court in State v. Phelps, in which that court stated that it would permit application of the doctrine "only when police have not acted in bad faith." (FN26) The Alaska Supreme Court simply adopted this same test, but stated it in terms of an intentional or knowing violation. Judge Sanders interpreted Smith in this manner, and concluded that the state had shown that O'Brien did not act in bad faith. This finding is supported by the record and is not clearly erroneous.

Smith contends that O'Brien violated his Fifth amendment right to remain silent and his Sixth

amendment right to counsel when she questioned him, obtaining his address. He argues that Judge Sanders should have decided on remand if O'Brien had intentionally or knowingly violated these constitutional rights. Smith notes that he raised these constitutional issues in the trial court in his initial motion to suppress, before the court of appeals in his appeal from the trial court's decision to deny suppression, and in his petition and brief to the supreme court. He argues that the constitutional issues were not reached because each court found a statutory violation and had no need to consider alternative constitutional issues.

In our former decision, although we suppressed Smith's statements to Officer O'Brien, we affirmed Smith's conviction by applying the independent source exception to the exclusionary rule. (FN27) We implicitly rejected the claim that Smith would be entitled to any greater relief if he showed constitutional violations rather than a statutory violation. Smith raised his constitutional claims before the supreme court. In its Smith opinion, the supreme court recognized only a violation of Smith's rights under AS 12.25.150. (FN28) It appears to us that the supreme court either implicitly rejected Smith's constitutional claims or concluded that even if Smith established a violation of his constitutional rights the same inevitable discovery test would apply. As we have previously stated, it does not appear to us that the federal test for inevitable discovery, as stated by the Ninth Circuit, is more strict than the test applied by the Supreme Court of Alaska. Furthermore, the trial court's prior findings make it clear that Officer O'Brien did not act in bad *611. faith when she questioned Smith. We therefore conclude that, even if Smith established that the

state also violated his constitutional rights, the state has established that the information concerning his address was the product of inevitable discovery and that there was no basis for suppressing the results of the search of his residence.

[4] Smith argues that Judge Sanders erred in failing to allow him to engage in further discovery about Officer O'Brien and her background in conducting interviews of suspects. We find no merit to Smith's contention. After Judge Sanders entered his findings on remand, Smith requested further discovery. Judge Sanders denied this request, noting that Smith was aware that O'Brien's good faith and knowledge were at issue on remand. He pointed out that Smith had specifically informed the court that he would not be seeking further discovery. He concluded that Smith had waived his opportunity to engage in further discovery and that it was inappropriate for Smith to ask for further discovery after the court had entered its ruling. We conclude that Judge Sanders did not abuse his discretion in reaching this conclusion.

The conviction is AFFIRMED.

FN1. 948 P.2d 473 (Alaska 1997).
FN2. AS 11.71.030(a)(1)(c).
FN3. See Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
FN4. See Zsupnik v. State, 789 P.2d 357 (Alaska 1990) (evidence obtained in violation of AS 12.25.150 must be excluded).
FN5. Smith v. State, Mem. Op. & J. No. 2641, at 6-8 (Alaska App., Mar. 10, 1993).
FN6. Smith v. State, Mem. Op. & J. No. 2956 at 2 (Alaska App., July 27, 1994).
FN7. 948 P.2d 473, 478 (Alaska 1997).

FN8. Id.
FN9. Id. at 478-81.
FN10. Id. at 481.
FN11. Id. at 478 (quoting Nix v. Williams, 467 U.S. 431, 442-43, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984)).
FN12. Id. at 478.
FN13. 467 U.S. 431, 459-60, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).
FN14. Smith, 948 P.2d at 480.
FN15. Id.
FN16. Id.
FN17. Id. (quoting 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 11.4(a) at 248 (3d ed.1996)).
FN18. Smith, 948 P.2d at 481.
FN19. Id.
FN20. See Wilburn v. State, 816 P.2d 907, 911 (Alaska App.1991); Ahkivgak v. State, 730 P.2d 168, 171 (Alaska App.1986).
FN21. 912 P.2d 1266, 1269-77 (Alaska App.1996).
FN22. Id. at 1271 (quoting United States v. Ramirez-Sandoval, 872 F.2d 1392, 1399 (9th Cir.1989)
FN23. Smith, 948 P.2d at 481.
FN24. Id.
FN25. 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.4(a) at 245 (3d. ed.1996).
FN26. 297 N.W.2d 769, 775 (N.D.1980).
FN27. Smith v. State, Mem. Op. & J. No. 2956 (Alaska App., July 27, 1994).
FN28. Smith, 948 P.2d at 481 n. 7.